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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair  
2023 - 2024 Regular

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**Bill No:** AB 1584                      **Hearing Date:** July 11, 2023  
**Author:** Weber  
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**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Criminal procedure: competence to stand trial*

### HISTORY

**Source:** California Public Defenders Association  
ACLU California Action

**Prior Legislation:** AB 1640 (Weber), held on suspense in Sen. Approps. Comm., 2022  
SB 1223 (Becker), Ch. 735, Stats. 2022  
SB 184 (Committee on Budget), Ch. 47, Stats. 2022  
SB 317 (Stern), Chapter 599, Statutes of 2021  
SB 215 (Beall), Ch. 1005, Stats. 2018  
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018  
SB 8 (Beall), held on Suspense File in Assem. Appropriations, 2017

**Support:** Depression and Bipolar Support Alliance; Disability Rights California; Friends Committee on Legislation of California; Initiate Justice (UNREG); National Association of Social Workers, California Chapter; Steinberg Institute

**Opposition:** California District Attorneys Association; California State Sheriffs' Association; San Diegans Against Crime; San Diego Deputy District Attorneys Association

**Assembly Floor Vote:** 50 - 18

### PURPOSE

*The purpose of this bill is to makes changes to the existing mental competency system for criminal defendants, including requiring a court to determine whether restoring a felony defendant to competency is in the interests of justice when the defendant has been deemed incompetent to stand trial.*

*Existing law* states that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code § 1367, subd. (a).)

*Existing law* requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is incompetent to stand trial (IST). (Pen. Code § 1368, subd. (b).)

*Existing law* provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code § 1368, subd. (c).)

*Existing law* provides that if the defendant is found mentally competent, the criminal process shall resume. If the defendant has been found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code § 1370, subd. (a).)

*Existing law* states that a person who has been found to be IST may be eligible for mental health diversion. (Pen. Code, § 1001.36, subd. (b)(1)(D).)

*Existing law* specifies how the trial on the issue of mental competency shall proceed. (Pen. Code § 1369.)

*Existing law* requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

*Existing law* provides that if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. (Pen. Code, § 1369, subd. (a)(1).)

*This bill* instead states that the court shall suspend the criminal proceedings and appoint at least one mental health expert to examine the defendant's mental condition and if the defendant is not seeking a finding of mental incompetence, the court shall appoint two mental health experts only upon request of defense counsel, in which case one shall be named by the defense and one shall be named by the prosecution.

*This bill* states that a mental health expert shall evaluate the defendant and submit a written report to the court. The report shall include the opinion of the expert regarding all of the following matters:

- A diagnosis of the defendant's mental condition, if any;
- Whether the defendant, as a result of a mental disorder or developmental disability, is able to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner;
- Whether there is a substantial likelihood that the defendant will attain competency in the foreseeable future; and,
- If requested by the defense, an opinion as to whether the defendant is eligible for mental health diversion.

*This bill* defines "mental health expert" to mean "a licensed psychologist or psychiatrist."

However, this bill does not preclude the court from appointing any other qualified expert to evaluate the defendant's mental condition in addition to a licensed psychologist or psychiatrist

*This bill* prohibits any statements made by the defendant during an examination pursuant to this section from being admitted in any other proceeding. This paragraph is intended to codify the holding of the United States Supreme Court in *Estelle v. Smith* (451 U.S. 454), and is therefore declarative of existing law.

*This bill* requires the report by the mental health expert to be completed and filed with the court within 30 days after the order, unless waived by the defendant or unless the court finds good cause for an extension.

*Existing law* states that in a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous. (Pen. Code, §1369, subd. (f).)

*Existing law* states that only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole. (Pen Code, § 1369, subd. (g).)

*This bill* states that if neither party objects to any competency report, the court may determine competency of the defendant based on the report. If either party objects and requests a hearing, the court shall hold a hearing to determine competence.

*This bill* provides that if the defendant waives the right to a jury trial the hearing shall be heard by the court. Otherwise, a determination of the defendant's competency to stand trial shall be decided by a jury.

*This bill* states that in a hearing to determine competence, the defendant is presumed competent unless it is proved by a preponderance of the evidence that the defendant is IST.

*Existing law* states that the purpose of mental health diversion is to promote the following:

- Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;
- Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings; and,
- Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

*Existing law* permits, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court, in its discretion, to grant pretrial mental health diversion to a defendant if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for that diversion. (Pen. Code, § 1001.36, subd. (a).)

*Existing law* provides that a defendant is eligible for pretrial diversion if both of the following criteria are met:

- The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence; and,
- The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (Pen. Code, § 1001.36, subd. (b).)

*Existing law* states that for any defendant who satisfies the eligibility requirements, the court must consider whether the defendant is suitable for pretrial diversion. The defendant is suitable for pretrial diversion if all of the following criteria are met:

- In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;
- The defendant consents to diversion and waives their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;
- The defendant agrees to comply with treatment as a condition of diversion, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of mental incompetence and cannot agree to comply with treatment; and,
- The defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subs. (c).)

*Existing law* excludes defendants charged with the following offenses from mental health diversion eligibility:

- Murder or voluntary manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for an indecent exposure violation;
- Rape;
- Lewd or lascivious act on a child under 14 years of age;
- Assault with intent to commit rape, sodomy, or oral copulation;
- Commission of rape or sexual penetration in concert with another person;
- Continuous sexual abuse of a child; and,
- Violations involving weapons of mass destruction. (Pen. Code, § 1001.36, subs. (d).)

*Existing law* provides that if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36, subd. (h).)

*Existing law* states that if the defendant is found mentally competent, the criminal process shall resume, the trial on the offense charged or hearing on the alleged violation shall proceed, and judgment may be pronounced. (Pen. Code, § 1370, subd. (a)(1)(A).)

*Existing law* states that if the defendant is found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code, § 1370, subd. (a)(1)(B).)

*Existing law* states that the court shall order the defendant who was found IST to be delivered by the sheriff to a State Department of State Hospitals facility, as directed by the State Department of State Hospitals, or to any other available public or private treatment facility, including a community-based residential treatment system approved by the community program director, or their designee, that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status. (Pen. Code, § 1370, subd. (a)(1)(C)(i).)

*This bill* states that if the defendant is found IST and is not charged with an offense that is statutorily excluded from mental health diversion, the trial, the hearing on the alleged violation, or the judgment shall be suspended, and the court shall determine whether restoring the person to mental competence is in the interests of justice.

*This bill* requires the court, in determining whether restoring the defendant's competency is in the interests of justice, to consider the relevant circumstances of the charged offense, the defendant's mental health condition and history of treatment, whether the defendant is likely to face incarceration if convicted, the likely length of any term of incarceration, whether restoring the person to mental competence will enhance public safety, and any other relevant considerations.

*This bill* provides that if restoring the person to mental competence is in the interests of justice, the court shall state its reasons orally on the record and the case shall proceed as provided.

*This bill* states that if restoring the person to mental competence is not in the interests of justice, the court may do either of the following:

- Conduct a hearing to determine if the defendant eligible for mental health diversion, and if eligible, grant diversion for a period not to exceed two years from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the complaint, whichever is shorter; or,
- Dismiss the charges, as provided.

*The bill* provides that if the court opts to conduct a hearing, the hearing shall be held no later than 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the court shall order the defendant to be released on their own recognizance pending the hearing.

*This bill* states that if the defendant performs satisfactorily on diversion, at the end of the period of diversion, the court shall dismiss the criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.

*This bill* states that if the court finds the defendant ineligible for diversion or if diversion is terminated unsuccessfully, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

- Order modification of the mental health diversion treatment plan in accordance with a recommendation from the treatment provider;
- Refer the defendant to assisted outpatient treatment, as provided;
- Refer the defendant to the county conservatorship investigator for possible conservatorship proceedings at which point the charges shall be dismissed as provided;
- Reinstate competency proceedings, in which case the court shall credit any time spent in mental health diversion against the maximum term of confinement as specified; or,
- Dismiss the charges, as provided.

*This bill* states that if at any time after the finding of IST, the court finds that there is no substantial likelihood that the defendant will attain mental competence in the foreseeable future, the defendant shall be returned to the committing court, as specified.

*This bill* provides that if the defendant is returned to court and the prosecution elects to dismiss and refile charges, the court shall presume that the defendant is incompetent unless the court is presented with relevant and credible evidence that the defendant is competent. Such evidence may include medical records, witness statements, or reports by qualified medical experts. If the court is satisfied that it has received substantial evidence that the defendant is competent, the court shall proceed as provided. Otherwise, the court shall find that the defendant is IST and shall proceed as provided.

*This bill* states that if the defendant is found IST after the refiling of charges, the defendant may be further committed only for the balance of time remaining as specified. The maximum term of commitment applies to the aggregate of all previous commitments.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Under existing law, when the court orders a mental health expert to offer an opinion regarding competency, the court does not have the authority to order the expert to offer an opinion regarding the defendant's eligibility for diversion or whether the defendant is likely to attain competency after treatment. Under existing law, an individual must receive substantive competency restoration services even when not in the interest of justice to do so, where the person is unlikely to be restored, or where other treatment options would be more effective.

This bill modernizes existing provisions of the State's competency scheme by:

- 1) Requiring judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted and the defendant's mental health condition and history of treatment.
- 2) If requested by the defense, requiring the court-appointed mental health expert to evaluate whether a person found incompetent to stand trial is eligible and suitable for mental health diversion.
- 3) Requiring a judge to determine, and court-appointed mental health experts to opine, whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame.
- 4) Requiring court-appointed mental health experts to return competency evaluations within 30 days absent good cause for an extension; and require any hearing for mental health diversion to take place within 30 days of a finding of incompetency.
- 5) Providing the defendant with the right to waive jury on the issue of competency.

## 2. Background: Mental Competency in Criminal Proceedings

The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is incompetent to stand trial [IST]. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The court may also make a determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

“The state treats the majority of felony ISTs in state hospitals; however, many individuals wait in county jails for many months given the limited number of DSH beds, which has resulted in a waitlist of felony ISTs who have not been admitted to DSH. The treatment provided to felony ISTs—known as ‘competency restoration treatment’—differs from general mental health treatment. The objective of competency restoration treatment is to treat a felony IST until they are competent enough to face their criminal charge, rather than provide comprehensive treatment for an underlying mental health condition.” (See [The 2022-23 Budget: Analysis of the Governor's Major Behavioral Health Proposals \(ca.gov\)](#) Legislative Analyst's Office [as of June 29, 2023].)



### 3. Committee on the Revision of the Penal Code’s Recommendation

On January 1, 2020, the Committee on the Revision of the Penal Code (“Committee”) was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee’s objectives are as follows:

- 1) Simplify and rationalize the substance of criminal law;
- 2) Simplify and rationalize criminal procedures;
- 3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- 4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing testimony from more than 50 witnesses, extensive public comment, thorough staff research, and deliberations of Committee members over the course of 6 public meetings, the Committee released its third annual report December 2022 describing its work and resulting 10 recommendations. (See <[http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_AR2022.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf)> [as of June 29, 2023].)

One of the Committee’s recommendations is to modernize the competency to stand trial system. The Committee’s report described the need to make changes to the current system:

The current system does not provide long-term treatment or improve safety. People who are found incompetent and then restored to competency often cycle back through the very same process — over a 10 year period, one-third of all people who were restored to competency and discharged from the Department of State Hospitals were later arrested and once again found incompetent to stand trial. Many were readmitted to DSH multiple times. The number of people found incompetent with more than 14 arrests has also steadily increased. Once returned to court after being found competent at the state hospital, people are most likely to be sent back into the community — only 24% of people found incompetent to stand trial are sent to prison — and 70% of people restored to competency are rearrested within 3 years.

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In the last 10 years, the number of people found incompetent to stand trial in California has far outpaced the state’s ability to provide timely services in response. The waitlist for placement at the state hospital — which only treats people with felony charges — has increased from 426 in 2014 to 1,737 in August 2022 and the average wait time for placement is 5 months.<sup>220</sup> The waitlist has grown even as the state made an additional 1,380 restoration beds available over

the last decade<sup>221</sup> and spent \$100 million to expand mental health diversion for people likely to become incompetent. The delays have resulted in a court order requiring the state to reduce the time it takes to begin competency restoration.

(*Id.* at 48-50.) The Committee made three recommendations:

- 1) Require judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted. A presumption against restoration would apply to: Penal Code section 1170(h) felonies, wobblers, and assault and robbery offenses. If a judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options.
- 2) Require court-appointed mental health experts to return competency evaluations within 30 days. The court may extend the time for good cause.
- 3) Require a judge to determine — and court-appointed mental health experts to opine — whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame. In addition, require the court-appointed mental health expert to evaluate their suitability for mental health diversion.

This bill implements most of these recommendations. Specifically, this bill requires judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense. If the judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options. This bill also requires the court-appointed mental health expert to complete competency reports within 30 days of the order, unless waived by the defendant or the court finds good cause for the extension. This bill also requires the mental health expert to evaluate the defendant's suitability for mental health diversion and for the expert and the court to determine whether a person found incompetent to stand trial has a substantial probability of attaining competency.

#### **4. Mental Health Diversion**

Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;

4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subs. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The diversion program cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is “to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.” (Pen. Code, § 1001.35, subd. (b).)

As noted above, consistent with the recommendation of the Committee on the Revision of the Penal Code, this bill would require the mental health expert evaluating the defendant on the issue of competence to also provide an opinion on eligibility for mental health diversion, thereby saving potential resources in the form of a subsequent evaluation.

In addition, this bill would require the court to consider placing a defendant on mental health diversion in situations where the court determines that restoring the person to competency is not in the interests of justice.

## **5. Argument in Support**

According to ACLU California Action, a co-sponsor of this bill:

In 2018, the Council of State Governments Justice Center (CSG) convened an advisory group of experts to identify improvements to competency to stand trial procedures. In order to decrease the number of people jailed and wait-listed for state hospital, CSG recommendations included limiting the use of competency restoration to more serious cases.

In 2022, consistent with CSG's suggested recommendations, the Committee on the Revision of the Penal Code (CRPC) recommended that judges be allowed to

determine whether restoration to competency is in the interests of justice, applying a presumption against restoration for nonviolent offenses.

AB 1584 aligns with recommendations from CSG and CRPC by giving judges the discretion to determine the most appropriate response to a finding of incompetency, allowing for quicker determinations of eligibility for mental health diversion, and creating earlier off-ramps from state hospital waitlists to community-based care where safe and appropriate.

## 6. Argument in Opposition

According to California District Attorneys Association (CDAA):

(CDAA) opposes AB 1584, which would authorize the court to find that restoration of a defendant's mental competency not to be in the interests of justice for some severely mentally ill defendants. These individuals would not receive mental health services within the criminal justice system. Instead, their criminal case would be dismissed, and these severely mentally ill criminal offenders would be returned to the streets or their homes, where they would likely re-enter the criminal justice system. The Incompetent to Stand Trial Solutions Workgroup, Report of Recommended Solutions reported that 70% of people found to be incompetent are rearrested within three years.

AB 1584 would also eliminate the prosecutor's right to seek a jury trial on the issue of competency. According to the Department of State Hospitals, over 66% of defendants who were initially found to be incompetent were able to have their competency restored. (*Incompetent to Stand Trial Solutions Workgroup – Report of Recommended Solutions November 2021*. Pg. 11.) An individual's mental health status and one's incompetency can be fluid and can change over time. The 66% restoration rate bears this out. Oftentimes, the issue of competency is a factual issue that must be litigated. This factual determination should be a fair process dedicated to reaching the truth of the individual's mental competency. However, AB 1584 unfairly tips those scales of justice by eliminating the prosecutor's ability to demand a jury trial on the issue of competency, while allowing the defendant the ability to demand a jury trial.

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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair  
2023 - 2024 Regular

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*The purpose of this bill is to makes changes to the existing mental competency system for criminal defendants, including requiring a court to determine whether restoring a felony defendant to competency is in the interests of justice when the defendant has been deemed incompetent to stand trial.*

*Existing law* states that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code § 1367, subd. (a).)

*Existing law* requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is incompetent to stand trial (IST). (Pen. Code § 1368, subd. (b).)

*Existing law* provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code § 1368, subd. (c).)

*Existing law* provides that if the defendant is found mentally competent, the criminal process shall resume. If the defendant has been found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code § 1370, subd. (a).)

*Existing law* states that a person who has been found to be IST may be eligible for mental health diversion. (Pen. Code, § 1001.36, subd. (b)(1)(D).)

*Existing law* specifies how the trial on the issue of mental competency shall proceed. (Pen. Code § 1369.)

*Existing law* requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

*Existing law* provides that if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. (Pen. Code, § 1369, subd. (a)(1).)

*This bill* instead states that the court shall suspend the criminal proceedings and appoint at least one mental health expert to examine the defendant's mental condition and if the defendant is not seeking a finding of mental incompetence, the court shall appoint two mental health experts only upon request of defense counsel, in which case one shall be named by the defense and one shall be named by the prosecution.

*This bill* states that a mental health expert shall evaluate the defendant and submit a written report to the court. The report shall include the opinion of the expert regarding all of the following matters:

- A diagnosis of the defendant's mental condition, if any;
- Whether the defendant, as a result of a mental disorder or developmental disability, is able to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner;
- Whether there is a substantial likelihood that the defendant will attain competency in the foreseeable future; and,
- If requested by the defense, an opinion as to whether the defendant is eligible for mental health diversion.

*This bill* defines "mental health expert" to mean "a licensed psychologist or psychiatrist."

However, this bill does not preclude the court from appointing any other qualified expert to evaluate the defendant's mental condition in addition to a licensed psychologist or psychiatrist

*This bill* prohibits any statements made by the defendant during an examination pursuant to this section from being admitted in any other proceeding. This paragraph is intended to codify the holding of the United States Supreme Court in *Estelle v. Smith* (451 U.S. 454), and is therefore declarative of existing law.

*This bill* requires the report by the mental health expert to be completed and filed with the court within 30 days after the order, unless waived by the defendant or unless the court finds good cause for an extension.

*Existing law* states that in a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous. (Pen. Code, §1369, subd. (f).)

*Existing law* states that only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole. (Pen Code, § 1369, subd. (g).)

*This bill* states that if neither party objects to any competency report, the court may determine competency of the defendant based on the report. If either party objects and requests a hearing, the court shall hold a hearing to determine competence.

*This bill* provides that if the defendant waives the right to a jury trial the hearing shall be heard by the court. Otherwise, a determination of the defendant's competency to stand trial shall be decided by a jury.

*This bill* states that in a hearing to determine competence, the defendant is presumed competent unless it is proved by a preponderance of the evidence that the defendant is IST.

*Existing law* states that the purpose of mental health diversion is to promote the following:

- Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;
- Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings; and,
- Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

*Existing law* permits, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court, in its discretion, to grant pretrial mental health diversion to a defendant if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for that diversion. (Pen. Code, § 1001.36, subd. (a).)

*Existing law* provides that a defendant is eligible for pretrial diversion if both of the following criteria are met:

- The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence; and,
- The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (Pen. Code, § 1001.36, subd. (b).)

*Existing law* states that for any defendant who satisfies the eligibility requirements, the court must consider whether the defendant is suitable for pretrial diversion. The defendant is suitable for pretrial diversion if all of the following criteria are met:

- In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;
- The defendant consents to diversion and waives their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;
- The defendant agrees to comply with treatment as a condition of diversion, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of mental incompetence and cannot agree to comply with treatment; and,
- The defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subds. (c).)



*Existing law* excludes defendants charged with the following offenses from mental health diversion eligibility:

- Murder or voluntary manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for an indecent exposure violation;
- Rape;
- Lewd or lascivious act on a child under 14 years of age;
- Assault with intent to commit rape, sodomy, or oral copulation;
- Commission of rape or sexual penetration in concert with another person;
- Continuous sexual abuse of a child; and,
- Violations involving weapons of mass destruction. (Pen. Code, § 1001.36, subs. (d).)

*Existing law* provides that if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36, subd. (h).)

*Existing law* states that if the defendant is found mentally competent, the criminal process shall resume, the trial on the offense charged or hearing on the alleged violation shall proceed, and judgment may be pronounced. (Pen. Code, § 1370, subd. (a)(1)(A).)

*Existing law* states that if the defendant is found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code, § 1370, subd. (a)(1)(B).)

*Existing law* states that the court shall order the defendant who was found IST to be delivered by the sheriff to a State Department of State Hospitals facility, as directed by the State Department of State Hospitals, or to any other available public or private treatment facility, including a community-based residential treatment system approved by the community program director, or their designee, that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status. (Pen. Code, § 1370, subd. (a)(1)(C)(i).)

*This bill* states that if the defendant is found IST and is not charged with an offense that is statutorily excluded from mental health diversion, the trial, the hearing on the alleged violation, or the judgment shall be suspended, and the court shall determine whether restoring the person to mental competence is in the interests of justice.

*This bill* requires the court, in determining whether restoring the defendant's competency is in the interests of justice, to consider the relevant circumstances of the charged offense, the defendant's mental health condition and history of treatment, whether the defendant is likely to face incarceration if convicted, the likely length of any term of incarceration, whether restoring the person to mental competence will enhance public safety, and any other relevant considerations.

*This bill* provides that if restoring the person to mental competence is in the interests of justice, the court shall state its reasons orally on the record and the case shall proceed as provided.

*This bill* states that if restoring the person to mental competence is not in the interests of justice, the court may do either of the following:

- Conduct a hearing to determine if the defendant eligible for mental health diversion, and if eligible, grant diversion for a period not to exceed two years from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the complaint, whichever is shorter; or,
- Dismiss the charges, as provided.

*The bill* provides that if the court opts to conduct a hearing, the hearing shall be held no later than 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the court shall order the defendant to be released on their own recognizance pending the hearing.

*This bill* states that if the defendant performs satisfactorily on diversion, at the end of the period of diversion, the court shall dismiss the criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.

*This bill* states that if the court finds the defendant ineligible for diversion or if diversion is terminated unsuccessfully, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

- Order modification of the mental health diversion treatment plan in accordance with a recommendation from the treatment provider;
- Refer the defendant to assisted outpatient treatment, as provided;
- Refer the defendant to the county conservatorship investigator for possible conservatorship proceedings at which point the charges shall be dismissed as provided;
- Reinstate competency proceedings, in which case the court shall credit any time spent in mental health diversion against the maximum term of confinement as specified; or,
- Dismiss the charges, as provided.

*This bill* states that if at any time after the finding of IST, the court finds that there is no substantial likelihood that the defendant will attain mental competence in the foreseeable future, the defendant shall be returned to the committing court, as specified.

*This bill* provides that if the defendant is returned to court and the prosecution elects to dismiss and refile charges, the court shall presume that the defendant is incompetent unless the court is presented with relevant and credible evidence that the defendant is competent. Such evidence may include medical records, witness statements, or reports by qualified medical experts. If the court is satisfied that it has received substantial evidence that the defendant is competent, the court shall proceed as provided. Otherwise, the court shall find that the defendant is IST and shall proceed as provided.

*This bill* states that if the defendant is found IST after the refiling of charges, the defendant may be further committed only for the balance of time remaining as specified. The maximum term of commitment applies to the aggregate of all previous commitments.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Under existing law, when the court orders a mental health expert to offer an opinion regarding competency, the court does not have the authority to order the expert to offer an opinion regarding the defendant's eligibility for diversion or whether the defendant is likely to attain competency after treatment. Under existing law, an individual must receive substantive competency restoration services even when not in the interest of justice to do so, where the person is unlikely to be restored, or where other treatment options would be more effective.

This bill modernizes existing provisions of the State's competency scheme by:

- 1) Requiring judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted and the defendant's mental health condition and history of treatment.
- 2) If requested by the defense, requiring the court-appointed mental health expert to evaluate whether a person found incompetent to stand trial is eligible and suitable for mental health diversion.
- 3) Requiring a judge to determine, and court-appointed mental health experts to opine, whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame.
- 4) Requiring court-appointed mental health experts to return competency evaluations within 30 days absent good cause for an extension; and require any hearing for mental health diversion to take place within 30 days of a finding of incompetency.
- 5) Providing the defendant with the right to waive jury on the issue of competency.

## 2. Background: Mental Competency in Criminal Proceedings

The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is incompetent to stand trial [IST]. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The court may also make a determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

“The state treats the majority of felony ISTs in state hospitals; however, many individuals wait in county jails for many months given the limited number of DSH beds, which has resulted in a waitlist of felony ISTs who have not been admitted to DSH. The treatment provided to felony ISTs—known as ‘competency restoration treatment’—differs from general mental health treatment. The objective of competency restoration treatment is to treat a felony IST until they are competent enough to face their criminal charge, rather than provide comprehensive treatment for an underlying mental health condition.” (See [The 2022-23 Budget: Analysis of the Governor's Major Behavioral Health Proposals \(ca.gov\)](#) Legislative Analyst's Office [as of June 29, 2023].)

### 3. Committee on the Revision of the Penal Code's Recommendation

On January 1, 2020, the Committee on the Revision of the Penal Code (“Committee”) was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee’s objectives are as follows:

- 1) Simplify and rationalize the substance of criminal law;
- 2) Simplify and rationalize criminal procedures;
- 3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- 4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing testimony from more than 50 witnesses, extensive public comment, thorough staff research, and deliberations of Committee members over the course of 6 public meetings, the Committee released its third annual report December 2022 describing its work and resulting 10 recommendations. (See <[http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_AR2022.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf)> [as of June 29, 2023].)

One of the Committee’s recommendations is to modernize the competency to stand trial system. The Committee’s report described the need to make changes to the current system:

The current system does not provide long-term treatment or improve safety. People who are found incompetent and then restored to competency often cycle back through the very same process — over a 10 year period, one-third of all people who were restored to competency and discharged from the Department of State Hospitals were later arrested and once again found incompetent to stand trial. Many were readmitted to DSH multiple times. The number of people found incompetent with more than 14 arrests has also steadily increased. Once returned to court after being found competent at the state hospital, people are most likely to be sent back into the community — only 24% of people found incompetent to stand trial are sent to prison — and 70% of people restored to competency are rearrested within 3 years.

....

In the last 10 years, the number of people found incompetent to stand trial in California has far outpaced the state’s ability to provide timely services in response. The waitlist for placement at the state hospital — which only treats people with felony charges — has increased from 426 in 2014 to 1,737 in August 2022 and the average wait time for placement is 5 months.<sup>220</sup> The waitlist has grown even as the state made an additional 1,380 restoration beds available over

the last decade<sup>221</sup> and spent \$100 million to expand mental health diversion for people likely to become incompetent. The delays have resulted in a court order requiring the state to reduce the time it takes to begin competency restoration.

(*Id.* at 48-50.) The Committee made three recommendations:

- 1) Require judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted. A presumption against restoration would apply to: Penal Code section 1170(h) felonies, wobblers, and assault and robbery offenses. If a judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options.
- 2) Require court-appointed mental health experts to return competency evaluations within 30 days. The court may extend the time for good cause.
- 3) Require a judge to determine — and court-appointed mental health experts to opine — whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame. In addition, require the court-appointed mental health expert to evaluate their suitability for mental health diversion.

This bill implements most of these recommendations. Specifically, this bill requires judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense. If the judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options. This bill also requires the court-appointed mental health expert to complete competency reports within 30 days of the order, unless waived by the defendant or the court finds good cause for the extension. This bill also requires the mental health expert to evaluate the defendant's suitability for mental health diversion and for the expert and the court to determine whether a person found incompetent to stand trial has a substantial probability of attaining competency.

#### **4. Mental Health Diversion**

Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;

4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subs. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The diversion program cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is “to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.” (Pen. Code, § 1001.35, subd. (b).)

As noted above, consistent with the recommendation of the Committee on the Revision of the Penal Code, this bill would require the mental health expert evaluating the defendant on the issue of competence to also provide an opinion on eligibility for mental health diversion, thereby saving potential resources in the form of a subsequent evaluation.

In addition, this bill would require the court to consider placing a defendant on mental health diversion in situations where the court determines that restoring the person to competency is not in the interests of justice.

## **5. Argument in Support**

According to ACLU California Action, a co-sponsor of this bill:

In 2018, the Council of State Governments Justice Center (CSG) convened an advisory group of experts to identify improvements to competency to stand trial procedures. In order to decrease the number of people jailed and wait-listed for state hospital, CSG recommendations included limiting the use of competency restoration to more serious cases.

In 2022, consistent with CSG's suggested recommendations, the Committee on the Revision of the Penal Code (CRPC) recommended that judges be allowed to

determine whether restoration to competency is in the interests of justice, applying a presumption against restoration for nonviolent offenses.

AB 1584 aligns with recommendations from CSG and CRPC by giving judges the discretion to determine the most appropriate response to a finding of incompetency, allowing for quicker determinations of eligibility for mental health diversion, and creating earlier off-ramps from state hospital waitlists to community-based care where safe and appropriate.

## 6. Argument in Opposition

According to California District Attorneys Association (CDAA):

(CDAA) opposes AB 1584, which would authorize the court to find that restoration of a defendant's mental competency not to be in the interests of justice for some severely mentally ill defendants. These individuals would not receive mental health services within the criminal justice system. Instead, their criminal case would be dismissed, and these severely mentally ill criminal offenders would be returned to the streets or their homes, where they would likely re-enter the criminal justice system. The Incompetent to Stand Trial Solutions Workgroup, Report of Recommended Solutions reported that 70% of people found to be incompetent are rearrested within three years.

AB 1584 would also eliminate the prosecutor's right to seek a jury trial on the issue of competency. According to the Department of State Hospitals, over 66% of defendants who were initially found to be incompetent were able to have their competency restored. (*Incompetent to Stand Trial Solutions Workgroup – Report of Recommended Solutions November 2021*. Pg. 11.) An individual's mental health status and one's incompetency can be fluid and can change over time. The 66% restoration rate bears this out. Oftentimes, the issue of competency is a factual issue that must be litigated. This factual determination should be a fair process dedicated to reaching the truth of the individual's mental competency. However, AB 1584 unfairly tips those scales of justice by eliminating the prosecutor's ability to demand a jury trial on the issue of competency, while allowing the defendant the ability to demand a jury trial.

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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair  
2023 - 2024 Regular

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**Bill No:** AB 1584                      **Hearing Date:** July 11, 2023  
**Author:** Weber  
**Version:** July 3, 2023  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Criminal procedure: competence to stand trial*

### HISTORY

**Source:** California Public Defenders Association  
ACLU California Action

**Prior Legislation:** AB 1640 (Weber), held on suspense in Sen. Approps. Comm., 2022  
SB 1223 (Becker), Ch. 735, Stats. 2022  
SB 184 (Committee on Budget), Ch. 47, Stats. 2022  
SB 317 (Stern), Chapter 599, Statutes of 2021  
SB 215 (Beall), Ch. 1005, Stats. 2018  
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018  
SB 8 (Beall), held on Suspense File in Assem. Appropriations, 2017

**Support:** Depression and Bipolar Support Alliance; Disability Rights California; Friends Committee on Legislation of California; Initiate Justice (UNREG); National Association of Social Workers, California Chapter; Steinberg Institute

**Opposition:** California District Attorneys Association; California State Sheriffs' Association; San Diegans Against Crime; San Diego Deputy District Attorneys Association

**Assembly Floor Vote:** 50 - 18

### PURPOSE

*The purpose of this bill is to makes changes to the existing mental competency system for criminal defendants, including requiring a court to determine whether restoring a felony defendant to competency is in the interests of justice when the defendant has been deemed incompetent to stand trial.*

*Existing law* states that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code § 1367, subd. (a).)

*Existing law* requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is incompetent to stand trial (IST). (Pen. Code § 1368, subd. (b).)

*Existing law* provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code § 1368, subd. (c).)

*Existing law* provides that if the defendant is found mentally competent, the criminal process shall resume. If the defendant has been found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code § 1370, subd. (a).)

*Existing law* states that a person who has been found to be IST may be eligible for mental health diversion. (Pen. Code, § 1001.36, subd. (b)(1)(D).)

*Existing law* specifies how the trial on the issue of mental competency shall proceed. (Pen. Code § 1369.)

*Existing law* requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

*Existing law* provides that if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. (Pen. Code, § 1369, subd. (a)(1).)

*This bill* instead states that the court shall suspend the criminal proceedings and appoint at least one mental health expert to examine the defendant's mental condition and if the defendant is not seeking a finding of mental incompetence, the court shall appoint two mental health experts only upon request of defense counsel, in which case one shall be named by the defense and one shall be named by the prosecution.

*This bill* states that a mental health expert shall evaluate the defendant and submit a written report to the court. The report shall include the opinion of the expert regarding all of the following matters:

- A diagnosis of the defendant's mental condition, if any;
- Whether the defendant, as a result of a mental disorder or developmental disability, is able to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner;
- Whether there is a substantial likelihood that the defendant will attain competency in the foreseeable future; and,
- If requested by the defense, an opinion as to whether the defendant is eligible for mental health diversion.

*This bill* defines "mental health expert" to mean "a licensed psychologist or psychiatrist."

However, this bill does not preclude the court from appointing any other qualified expert to evaluate the defendant's mental condition in addition to a licensed psychologist or psychiatrist

*This bill* prohibits any statements made by the defendant during an examination pursuant to this section from being admitted in any other proceeding. This paragraph is intended to codify the holding of the United States Supreme Court in *Estelle v. Smith* (451 U.S. 454), and is therefore declarative of existing law.

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- Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;
- Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings; and,
- Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

*Existing law* permits, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court, in its discretion, to grant pretrial mental health diversion to a defendant if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for that diversion. (Pen. Code, § 1001.36, subd. (a).)

*Existing law* provides that a defendant is eligible for pretrial diversion if both of the following criteria are met:

- The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence; and,
- The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (Pen. Code, § 1001.36, subd. (b).)

*Existing law* states that for any defendant who satisfies the eligibility requirements, the court must consider whether the defendant is suitable for pretrial diversion. The defendant is suitable for pretrial diversion if all of the following criteria are met:

- In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;
- The defendant consents to diversion and waives their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;
- The defendant agrees to comply with treatment as a condition of diversion, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of mental incompetence and cannot agree to comply with treatment; and,
- The defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subds. (c).)

*Existing law* excludes defendants charged with the following offenses from mental health diversion eligibility:

- Murder or voluntary manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for an indecent exposure violation;
- Rape;
- Lewd or lascivious act on a child under 14 years of age;
- Assault with intent to commit rape, sodomy, or oral copulation;
- Commission of rape or sexual penetration in concert with another person;
- Continuous sexual abuse of a child; and,
- Violations involving weapons of mass destruction. (Pen. Code, § 1001.36, subs. (d).)

*Existing law* provides that if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36, subd. (h).)

*Existing law* states that if the defendant is found mentally competent, the criminal process shall resume, the trial on the offense charged or hearing on the alleged violation shall proceed, and judgment may be pronounced. (Pen. Code, § 1370, subd. (a)(1)(A).)

*Existing law* states that if the defendant is found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code, § 1370, subd. (a)(1)(B).)

*Existing law* states that the court shall order the defendant who was found IST to be delivered by the sheriff to a State Department of State Hospitals facility, as directed by the State Department of State Hospitals, or to any other available public or private treatment facility, including a community-based residential treatment system approved by the community program director, or their designee, that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status. (Pen. Code, § 1370, subd. (a)(1)(C)(i).)

*This bill* states that if the defendant is found IST and is not charged with an offense that is statutorily excluded from mental health diversion, the trial, the hearing on the alleged violation, or the judgment shall be suspended, and the court shall determine whether restoring the person to mental competence is in the interests of justice.

*This bill* requires the court, in determining whether restoring the defendant's competency is in the interests of justice, to consider the relevant circumstances of the charged offense, the defendant's mental health condition and history of treatment, whether the defendant is likely to face incarceration if convicted, the likely length of any term of incarceration, whether restoring the person to mental competence will enhance public safety, and any other relevant considerations.

*This bill* provides that if restoring the person to mental competence is in the interests of justice, the court shall state its reasons orally on the record and the case shall proceed as provided.

*This bill* states that if restoring the person to mental competence is not in the interests of justice, the court may do either of the following:

- Conduct a hearing to determine if the defendant eligible for mental health diversion, and if eligible, grant diversion for a period not to exceed two years from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the complaint, whichever is shorter; or,
- Dismiss the charges, as provided.

*The bill* provides that if the court opts to conduct a hearing, the hearing shall be held no later than 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the court shall order the defendant to be released on their own recognizance pending the hearing.

*This bill* states that if the defendant performs satisfactorily on diversion, at the end of the period of diversion, the court shall dismiss the criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.

*This bill* states that if the court finds the defendant ineligible for diversion or if diversion is terminated unsuccessfully, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

- Order modification of the mental health diversion treatment plan in accordance with a recommendation from the treatment provider;
- Refer the defendant to assisted outpatient treatment, as provided;
- Refer the defendant to the county conservatorship investigator for possible conservatorship proceedings at which point the charges shall be dismissed as provided;
- Reinstate competency proceedings, in which case the court shall credit any time spent in mental health diversion against the maximum term of confinement as specified; or,
- Dismiss the charges, as provided.

*This bill* states that if at any time after the finding of IST, the court finds that there is no substantial likelihood that the defendant will attain mental competence in the foreseeable future, the defendant shall be returned to the committing court, as specified.

*This bill* provides that if the defendant is returned to court and the prosecution elects to dismiss and refile charges, the court shall presume that the defendant is incompetent unless the court is presented with relevant and credible evidence that the defendant is competent. Such evidence may include medical records, witness statements, or reports by qualified medical experts. If the court is satisfied that it has received substantial evidence that the defendant is competent, the court shall proceed as provided. Otherwise, the court shall find that the defendant is IST and shall proceed as provided.

*This bill* states that if the defendant is found IST after the refiling of charges, the defendant may be further committed only for the balance of time remaining as specified. The maximum term of commitment applies to the aggregate of all previous commitments.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Under existing law, when the court orders a mental health expert to offer an opinion regarding competency, the court does not have the authority to order the expert to offer an opinion regarding the defendant's eligibility for diversion or whether the defendant is likely to attain competency after treatment. Under existing law, an individual must receive substantive competency restoration services even when not in the interest of justice to do so, where the person is unlikely to be restored, or where other treatment options would be more effective.

This bill modernizes existing provisions of the State's competency scheme by:

- 1) Requiring judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted and the defendant's mental health condition and history of treatment.
- 2) If requested by the defense, requiring the court-appointed mental health expert to evaluate whether a person found incompetent to stand trial is eligible and suitable for mental health diversion.
- 3) Requiring a judge to determine, and court-appointed mental health experts to opine, whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame.
- 4) Requiring court-appointed mental health experts to return competency evaluations within 30 days absent good cause for an extension; and require any hearing for mental health diversion to take place within 30 days of a finding of incompetency.
- 5) Providing the defendant with the right to waive jury on the issue of competency.

## 2. Background: Mental Competency in Criminal Proceedings

The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is incompetent to stand trial [IST]. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The court may also make a determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

“The state treats the majority of felony ISTs in state hospitals; however, many individuals wait in county jails for many months given the limited number of DSH beds, which has resulted in a waitlist of felony ISTs who have not been admitted to DSH. The treatment provided to felony ISTs—known as ‘competency restoration treatment’—differs from general mental health treatment. The objective of competency restoration treatment is to treat a felony IST until they are competent enough to face their criminal charge, rather than provide comprehensive treatment for an underlying mental health condition.” (See [The 2022-23 Budget: Analysis of the Governor's Major Behavioral Health Proposals \(ca.gov\)](#) Legislative Analyst's Office [as of June 29, 2023].)



### 3. Committee on the Revision of the Penal Code’s Recommendation

On January 1, 2020, the Committee on the Revision of the Penal Code (“Committee”) was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee’s objectives are as follows:

- 1) Simplify and rationalize the substance of criminal law;
- 2) Simplify and rationalize criminal procedures;
- 3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- 4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing testimony from more than 50 witnesses, extensive public comment, thorough staff research, and deliberations of Committee members over the course of 6 public meetings, the Committee released its third annual report December 2022 describing its work and resulting 10 recommendations. (See <[http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_AR2022.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf)> [as of June 29, 2023].)

One of the Committee’s recommendations is to modernize the competency to stand trial system. The Committee’s report described the need to make changes to the current system:

The current system does not provide long-term treatment or improve safety. People who are found incompetent and then restored to competency often cycle back through the very same process — over a 10 year period, one-third of all people who were restored to competency and discharged from the Department of State Hospitals were later arrested and once again found incompetent to stand trial. Many were readmitted to DSH multiple times. The number of people found incompetent with more than 14 arrests has also steadily increased. Once returned to court after being found competent at the state hospital, people are most likely to be sent back into the community — only 24% of people found incompetent to stand trial are sent to prison — and 70% of people restored to competency are rearrested within 3 years.

....

In the last 10 years, the number of people found incompetent to stand trial in California has far outpaced the state’s ability to provide timely services in response. The waitlist for placement at the state hospital — which only treats people with felony charges — has increased from 426 in 2014 to 1,737 in August 2022 and the average wait time for placement is 5 months.<sup>220</sup> The waitlist has grown even as the state made an additional 1,380 restoration beds available over

the last decade<sup>221</sup> and spent \$100 million to expand mental health diversion for people likely to become incompetent. The delays have resulted in a court order requiring the state to reduce the time it takes to begin competency restoration.

(*Id.* at 48-50.) The Committee made three recommendations:

- 1) Require judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted. A presumption against restoration would apply to: Penal Code section 1170(h) felonies, wobblers, and assault and robbery offenses. If a judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options.
- 2) Require court-appointed mental health experts to return competency evaluations within 30 days. The court may extend the time for good cause.
- 3) Require a judge to determine — and court-appointed mental health experts to opine — whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame. In addition, require the court-appointed mental health expert to evaluate their suitability for mental health diversion.

This bill implements most of these recommendations. Specifically, this bill requires judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense. If the judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options. This bill also requires the court-appointed mental health expert to complete competency reports within 30 days of the order, unless waived by the defendant or the court finds good cause for the extension. This bill also requires the mental health expert to evaluate the defendant's suitability for mental health diversion and for the expert and the court to determine whether a person found incompetent to stand trial has a substantial probability of attaining competency.

#### **4. Mental Health Diversion**

Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;

4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subs. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The diversion program cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is “to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.” (Pen. Code, § 1001.35, subd. (b).)

As noted above, consistent with the recommendation of the Committee on the Revision of the Penal Code, this bill would require the mental health expert evaluating the defendant on the issue of competence to also provide an opinion on eligibility for mental health diversion, thereby saving potential resources in the form of a subsequent evaluation.

In addition, this bill would require the court to consider placing a defendant on mental health diversion in situations where the court determines that restoring the person to competency is not in the interests of justice.

## **5. Argument in Support**

According to ACLU California Action, a co-sponsor of this bill:

In 2018, the Council of State Governments Justice Center (CSG) convened an advisory group of experts to identify improvements to competency to stand trial procedures. In order to decrease the number of people jailed and wait-listed for state hospital, CSG recommendations included limiting the use of competency restoration to more serious cases.

In 2022, consistent with CSG's suggested recommendations, the Committee on the Revision of the Penal Code (CRPC) recommended that judges be allowed to

determine whether restoration to competency is in the interests of justice, applying a presumption against restoration for nonviolent offenses.

AB 1584 aligns with recommendations from CSG and CRPC by giving judges the discretion to determine the most appropriate response to a finding of incompetency, allowing for quicker determinations of eligibility for mental health diversion, and creating earlier off-ramps from state hospital waitlists to community-based care where safe and appropriate.

## 6. Argument in Opposition

According to California District Attorneys Association (CDAA):

(CDAA) opposes AB 1584, which would authorize the court to find that restoration of a defendant's mental competency not to be in the interests of justice for some severely mentally ill defendants. These individuals would not receive mental health services within the criminal justice system. Instead, their criminal case would be dismissed, and these severely mentally ill criminal offenders would be returned to the streets or their homes, where they would likely re-enter the criminal justice system. The Incompetent to Stand Trial Solutions Workgroup, Report of Recommended Solutions reported that 70% of people found to be incompetent are rearrested within three years.

AB 1584 would also eliminate the prosecutor's right to seek a jury trial on the issue of competency. According to the Department of State Hospitals, over 66% of defendants who were initially found to be incompetent were able to have their competency restored. (*Incompetent to Stand Trial Solutions Workgroup – Report of Recommended Solutions November 2021*. Pg. 11.) An individual's mental health status and one's incompetency can be fluid and can change over time. The 66% restoration rate bears this out. Oftentimes, the issue of competency is a factual issue that must be litigated. This factual determination should be a fair process dedicated to reaching the truth of the individual's mental competency. However, AB 1584 unfairly tips those scales of justice by eliminating the prosecutor's ability to demand a jury trial on the issue of competency, while allowing the defendant the ability to demand a jury trial.

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## SENATE COMMITTEE ON PUBLIC SAFETY

Senator Aisha Wahab, Chair  
2023 - 2024 Regular

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**Bill No:** AB 1584                      **Hearing Date:** July 11, 2023  
**Author:** Weber  
**Version:** July 3, 2023  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Criminal procedure: competence to stand trial*

### HISTORY

**Source:** California Public Defenders Association  
ACLU California Action

**Prior Legislation:** AB 1640 (Weber), held on suspense in Sen. Approps. Comm., 2022  
SB 1223 (Becker), Ch. 735, Stats. 2022  
SB 184 (Committee on Budget), Ch. 47, Stats. 2022  
SB 317 (Stern), Chapter 599, Statutes of 2021  
SB 215 (Beall), Ch. 1005, Stats. 2018  
AB 1810 (Committee on Budget), Ch. 34, Stats. 2018  
SB 8 (Beall), held on Suspense File in Assem. Appropriations, 2017

**Support:** Depression and Bipolar Support Alliance; Disability Rights California; Friends Committee on Legislation of California; Initiate Justice (UNREG); National Association of Social Workers, California Chapter; Steinberg Institute

**Opposition:** California District Attorneys Association; California State Sheriffs' Association; San Diegans Against Crime; San Diego Deputy District Attorneys Association

**Assembly Floor Vote:** 50 - 18

### PURPOSE

*The purpose of this bill is to makes changes to the existing mental competency system for criminal defendants, including requiring a court to determine whether restoring a felony defendant to competency is in the interests of justice when the defendant has been deemed incompetent to stand trial.*

*Existing law* states that a person cannot be tried or adjudged to punishment or have his or her probation, mandatory supervision, postrelease community supervision, or parole revoked while that person is mentally incompetent. (Pen. Code § 1367, subd. (a).)

*Existing law* requires, when counsel has declared a doubt as to the defendant's competence, the court to hold a hearing determine whether the defendant is incompetent to stand trial (IST). (Pen. Code § 1368, subd. (b).)

*Existing law* provides that, except as provided, when an order for a hearing into the present mental competence of the defendant has been issued, all proceedings in the criminal prosecution shall be suspended until the question of whether the defendant is IST is determined. (Pen. Code § 1368, subd. (c).)

*Existing law* provides that if the defendant is found mentally competent, the criminal process shall resume. If the defendant has been found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code § 1370, subd. (a).)

*Existing law* states that a person who has been found to be IST may be eligible for mental health diversion. (Pen. Code, § 1001.36, subd. (b)(1)(D).)

*Existing law* specifies how the trial on the issue of mental competency shall proceed. (Pen. Code § 1369.)

*Existing law* requires the court to appoint a psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. (Pen. Code, § 1369, subd. (a)(1).)

*Existing law* provides that if the defendant or defendant's counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court shall appoint two psychiatrists, licensed psychologists, or a combination thereof. One of the psychiatrists or licensed psychologists may be named by the defense and one may be named by the prosecution. (Pen. Code, § 1369, subd. (a)(1).)

*This bill* instead states that the court shall suspend the criminal proceedings and appoint at least one mental health expert to examine the defendant's mental condition and if the defendant is not seeking a finding of mental incompetence, the court shall appoint two mental health experts only upon request of defense counsel, in which case one shall be named by the defense and one shall be named by the prosecution.

*This bill* states that a mental health expert shall evaluate the defendant and submit a written report to the court. The report shall include the opinion of the expert regarding all of the following matters:

- A diagnosis of the defendant's mental condition, if any;
- Whether the defendant, as a result of a mental disorder or developmental disability, is able to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner;
- Whether there is a substantial likelihood that the defendant will attain competency in the foreseeable future; and,
- If requested by the defense, an opinion as to whether the defendant is eligible for mental health diversion.

*This bill* defines "mental health expert" to mean "a licensed psychologist or psychiatrist."

However, this bill does not preclude the court from appointing any other qualified expert to evaluate the defendant's mental condition in addition to a licensed psychologist or psychiatrist

*This bill* prohibits any statements made by the defendant during an examination pursuant to this section from being admitted in any other proceeding. This paragraph is intended to codify the holding of the United States Supreme Court in *Estelle v. Smith* (451 U.S. 454), and is therefore declarative of existing law.

*This bill* requires the report by the mental health expert to be completed and filed with the court within 30 days after the order, unless waived by the defendant or unless the court finds good cause for an extension.

*Existing law* states that in a jury trial, the court shall charge the jury, instructing them on all matters of law necessary for the rendering of a verdict. It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent. The verdict of the jury shall be unanimous. (Pen. Code, §1369, subd. (f).)

*Existing law* states that only a court trial is required to determine competency in a proceeding for a violation of probation, mandatory supervision, postrelease community supervision, or parole. (Pen Code, § 1369, subd. (g).)

*This bill* states that if neither party objects to any competency report, the court may determine competency of the defendant based on the report. If either party objects and requests a hearing, the court shall hold a hearing to determine competence.

*This bill* provides that if the defendant waives the right to a jury trial the hearing shall be heard by the court. Otherwise, a determination of the defendant's competency to stand trial shall be decided by a jury.

*This bill* states that in a hearing to determine competence, the defendant is presumed competent unless it is proved by a preponderance of the evidence that the defendant is IST.

*Existing law* states that the purpose of mental health diversion is to promote the following:

- Increased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety;
- Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings; and,
- Providing diversion that meets the unique mental health treatment and support needs of individuals with mental disorders. (Pen. Code, § 1001.35.)

*Existing law* permits, on an accusatory pleading alleging the commission of a misdemeanor or felony offense, the court, in its discretion, to grant pretrial mental health diversion to a defendant if the defendant satisfies the eligibility requirements and the court determines that the defendant is suitable for that diversion. (Pen. Code, § 1001.36, subd. (a).)

*Existing law* provides that a defendant is eligible for pretrial diversion if both of the following criteria are met:

- The defendant has been diagnosed with a mental disorder as identified in the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders, including, but not limited to, bipolar disorder, schizophrenia, schizoaffective disorder, or post-traumatic stress disorder, but excluding antisocial personality disorder, borderline personality disorder, and pedophilia. Evidence of the defendant's mental disorder shall be provided by the defense and shall include a diagnosis or treatment for a diagnosed mental disorder within the last five years by a qualified mental health expert. In opining that a defendant suffers from a qualifying disorder, the qualified mental health expert may rely on an examination of the defendant, the defendant's medical records, arrest reports, or any other relevant evidence; and,
- The defendant's mental disorder was a significant factor in the commission of the charged offense. If the defendant has been diagnosed with a mental disorder, the court shall find that the defendant's mental disorder was a significant factor in the commission of the offense unless there is clear and convincing evidence that it was not a motivating factor, causal factor, or contributing factor to the defendant's involvement in the alleged offense. A court may consider any relevant and credible evidence, including, but not limited to, police reports, preliminary hearing transcripts, witness statements, statements by the defendant's mental health treatment provider, medical records, records or reports by qualified medical experts, or evidence that the defendant displayed symptoms consistent with the relevant mental disorder at or near the time of the offense. (Pen. Code, § 1001.36, subd. (b).)

*Existing law* states that for any defendant who satisfies the eligibility requirements, the court must consider whether the defendant is suitable for pretrial diversion. The defendant is suitable for pretrial diversion if all of the following criteria are met:

- In the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;
- The defendant consents to diversion and waives their right to a speedy trial, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment due to their mental incompetence and cannot consent to diversion or give a knowing and intelligent waiver of their right to a speedy trial;
- The defendant agrees to comply with treatment as a condition of diversion, unless a defendant has been found to be an appropriate candidate for diversion in lieu of commitment for restoration of mental incompetence and cannot agree to comply with treatment; and,
- The defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. In making this determination, the court may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's treatment plan, the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate. (Pen. Code, § 1001.36, subs. (c).)



*Existing law* excludes defendants charged with the following offenses from mental health diversion eligibility:

- Murder or voluntary manslaughter;
- An offense for which a person, if convicted, would be required to register as a sex offender, except for an indecent exposure violation;
- Rape;
- Lewd or lascivious act on a child under 14 years of age;
- Assault with intent to commit rape, sodomy, or oral copulation;
- Commission of rape or sexual penetration in concert with another person;
- Continuous sexual abuse of a child; and,
- Violations involving weapons of mass destruction. (Pen. Code, § 1001.36, subs. (d).)

*Existing law* provides that if the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion. A court may conclude that the defendant has performed satisfactorily if the defendant has substantially complied with the requirements of diversion, has avoided significant new violations of law unrelated to the defendant's mental health condition, and has a plan in place for long-term mental health care. (Pen. Code, § 1001.36, subd. (h).)

*Existing law* states that if the defendant is found mentally competent, the criminal process shall resume, the trial on the offense charged or hearing on the alleged violation shall proceed, and judgment may be pronounced. (Pen. Code, § 1370, subd. (a)(1)(A).)

*Existing law* states that if the defendant is found IST, the trial, the hearing on the alleged violation, or the judgment shall be suspended until the person becomes mentally competent. (Pen. Code, § 1370, subd. (a)(1)(B).)

*Existing law* states that the court shall order the defendant who was found IST to be delivered by the sheriff to a State Department of State Hospitals facility, as directed by the State Department of State Hospitals, or to any other available public or private treatment facility, including a community-based residential treatment system approved by the community program director, or their designee, that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status. (Pen. Code, § 1370, subd. (a)(1)(C)(i).)

*This bill* states that if the defendant is found IST and is not charged with an offense that is statutorily excluded from mental health diversion, the trial, the hearing on the alleged violation, or the judgment shall be suspended, and the court shall determine whether restoring the person to mental competence is in the interests of justice.

*This bill* requires the court, in determining whether restoring the defendant's competency is in the interests of justice, to consider the relevant circumstances of the charged offense, the defendant's mental health condition and history of treatment, whether the defendant is likely to face incarceration if convicted, the likely length of any term of incarceration, whether restoring the person to mental competence will enhance public safety, and any other relevant considerations.

*This bill* provides that if restoring the person to mental competence is in the interests of justice, the court shall state its reasons orally on the record and the case shall proceed as provided.

*This bill* states that if restoring the person to mental competence is not in the interests of justice, the court may do either of the following:

- Conduct a hearing to determine if the defendant eligible for mental health diversion, and if eligible, grant diversion for a period not to exceed two years from the date the individual is accepted into diversion or the maximum term of imprisonment provided by law for the most serious offense charged in the complaint, whichever is shorter; or,
- Dismiss the charges, as provided.

*The bill* provides that if the court opts to conduct a hearing, the hearing shall be held no later than 30 days after the finding of incompetence. If the hearing is delayed beyond 30 days, the court shall order the defendant to be released on their own recognizance pending the hearing.

*This bill* states that if the defendant performs satisfactorily on diversion, at the end of the period of diversion, the court shall dismiss the criminal charges that were the subject of the criminal proceedings at the time of the initial diversion.

*This bill* states that if the court finds the defendant ineligible for diversion or if diversion is terminated unsuccessfully, the court may, after notice to the defendant, defense counsel, and the prosecution, hold a hearing to determine whether to do any of the following:

- Order modification of the mental health diversion treatment plan in accordance with a recommendation from the treatment provider;
- Refer the defendant to assisted outpatient treatment, as provided;
- Refer the defendant to the county conservatorship investigator for possible conservatorship proceedings at which point the charges shall be dismissed as provided;
- Reinstate competency proceedings, in which case the court shall credit any time spent in mental health diversion against the maximum term of confinement as specified; or,
- Dismiss the charges, as provided.

*This bill* states that if at any time after the finding of IST, the court finds that there is no substantial likelihood that the defendant will attain mental competence in the foreseeable future, the defendant shall be returned to the committing court, as specified.

*This bill* provides that if the defendant is returned to court and the prosecution elects to dismiss and refile charges, the court shall presume that the defendant is incompetent unless the court is presented with relevant and credible evidence that the defendant is competent. Such evidence may include medical records, witness statements, or reports by qualified medical experts. If the court is satisfied that it has received substantial evidence that the defendant is competent, the court shall proceed as provided. Otherwise, the court shall find that the defendant is IST and shall proceed as provided.

*This bill* states that if the defendant is found IST after the refiling of charges, the defendant may be further committed only for the balance of time remaining as specified. The maximum term of commitment applies to the aggregate of all previous commitments.

## COMMENTS

### 1. Need for This Bill

According to the author of this bill:

Under existing law, when the court orders a mental health expert to offer an opinion regarding competency, the court does not have the authority to order the expert to offer an opinion regarding the defendant's eligibility for diversion or whether the defendant is likely to attain competency after treatment. Under existing law, an individual must receive substantive competency restoration services even when not in the interest of justice to do so, where the person is unlikely to be restored, or where other treatment options would be more effective.

This bill modernizes existing provisions of the State's competency scheme by:

- 1) Requiring judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted and the defendant's mental health condition and history of treatment.
- 2) If requested by the defense, requiring the court-appointed mental health expert to evaluate whether a person found incompetent to stand trial is eligible and suitable for mental health diversion.
- 3) Requiring a judge to determine, and court-appointed mental health experts to opine, whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame.
- 4) Requiring court-appointed mental health experts to return competency evaluations within 30 days absent good cause for an extension; and require any hearing for mental health diversion to take place within 30 days of a finding of incompetency.
- 5) Providing the defendant with the right to waive jury on the issue of competency.

## 2. Background: Mental Competency in Criminal Proceedings

The Due Process Clause of the United States Constitution prohibits the criminal prosecution of a defendant who is not mentally competent to stand trial. Existing law provides that if a person has been charged with a crime and is not able to understand the nature of the criminal proceedings and/or is not able to assist counsel in his or her defense, the court may determine that the offender is incompetent to stand trial [IST]. (Pen. Code § 1367.) When the court issues an order for a hearing into the present mental competence of the defendant, all proceedings in the criminal prosecution are suspended until the question of present mental competence has been determined. (Pen. Code, §1368, subd. (c).)

In order to determine mental competence, the court must appoint a psychiatrist or licensed psychologist to examine the defendant. If defense counsel opposes a finding on incompetence, the court must appoint two experts: one chosen by the defense, one by the prosecution. (Pen. Code, § 11369, subd. (a).) The examining expert(s) must evaluate the defendant's alleged mental disorder and the defendant's ability to understand the proceedings and assist counsel, as well as address whether antipsychotic medication is medically appropriate. (Pen. Code, § 1369, subd. (a).)

Both parties have a right to a jury trial to decide competency. (Pen. Code, § 1369.) A formal trial is not required when jury trial has been waived. (*People v. Harris* (1993) 14 Cal.App.4th 984.) The burden of proof is on the party seeking a finding of incompetence. (*People v. Skeirik* (1991) 229 Cal.App.3d 444, 459-460.) Because a defendant is initially considered competent to stand trial (*Medina v. California* (1992) 505 U.S. 437), usually this means that the defense bears the burden of proof to establish incompetence. Therefore, defense counsel must first present evidence to support mental incompetence. However, if defense counsel does not want to offer evidence to have the defendant declared incompetent, the prosecution may. Each party may offer rebuttal evidence. Final arguments are presented to the court or jury, with the prosecution going first, followed by defense counsel. (Pen. Code, § 1369, subds. (b)-(e).)

If after an examination and hearing the defendant is found IST, the criminal proceedings are suspended and the court shall order the defendant to be referred to DSH, or to any other available public or private treatment facility, including a community-based residential treatment system if the facility has a secured perimeter or a locked and controlled treatment facility, approved by the community program director that will promote the defendant's speedy restoration to mental competence, or placed on outpatient status, except as specified. (Pen. Code § 1368, subd. (c) and 1370, subd. (a)(1)(B).) The court may also make a determination as to whether the defendant is an appropriate candidate for mental health diversion pursuant to Penal Code section 1001.36.

“The state treats the majority of felony ISTs in state hospitals; however, many individuals wait in county jails for many months given the limited number of DSH beds, which has resulted in a waitlist of felony ISTs who have not been admitted to DSH. The treatment provided to felony ISTs—known as ‘competency restoration treatment’—differs from general mental health treatment. The objective of competency restoration treatment is to treat a felony IST until they are competent enough to face their criminal charge, rather than provide comprehensive treatment for an underlying mental health condition.” (See [The 2022-23 Budget: Analysis of the Governor's Major Behavioral Health Proposals \(ca.gov\)](#) Legislative Analyst's Office [as of June 29, 2023].)

### 3. Committee on the Revision of the Penal Code’s Recommendation

On January 1, 2020, the Committee on the Revision of the Penal Code (“Committee”) was established within the Law Review Commission to study the Penal Code and recommend statutory reforms. (SB 94, Ch. 25, Stats. 2019; Gov. Code, § 8280.) The Committee’s objectives are as follows:

- 1) Simplify and rationalize the substance of criminal law;
- 2) Simplify and rationalize criminal procedures;
- 3) Establish alternatives to incarceration that will aid in the rehabilitation of offenders; and,
- 4) Improve the system of parole and probation.

(Gov. Code, § 8290.5, subd. (a).) In making recommendations to achieve these objectives, the Committee may recommend adjustments to the length of sentence terms. (Gov. Code, § 8290.5, subd. (b).) The Committee is required to prepare an annual report that describes its work in the prior calendar year and its expected work for the subsequent calendar year. (Gov. Code, § 8293, subd. (b).)

After holding meetings over the course of a year and hearing testimony from more than 50 witnesses, extensive public comment, thorough staff research, and deliberations of Committee members over the course of 6 public meetings, the Committee released its third annual report December 2022 describing its work and resulting 10 recommendations. (See <[http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC\\_AR2022.pdf](http://www.clrc.ca.gov/CRPC/Pub/Reports/CRPC_AR2022.pdf)> [as of June 29, 2023].)

One of the Committee’s recommendations is to modernize the competency to stand trial system. The Committee’s report described the need to make changes to the current system:

The current system does not provide long-term treatment or improve safety. People who are found incompetent and then restored to competency often cycle back through the very same process — over a 10 year period, one-third of all people who were restored to competency and discharged from the Department of State Hospitals were later arrested and once again found incompetent to stand trial. Many were readmitted to DSH multiple times. The number of people found incompetent with more than 14 arrests has also steadily increased. Once returned to court after being found competent at the state hospital, people are most likely to be sent back into the community — only 24% of people found incompetent to stand trial are sent to prison — and 70% of people restored to competency are rearrested within 3 years.

....

In the last 10 years, the number of people found incompetent to stand trial in California has far outpaced the state’s ability to provide timely services in response. The waitlist for placement at the state hospital — which only treats people with felony charges — has increased from 426 in 2014 to 1,737 in August 2022 and the average wait time for placement is 5 months.<sup>220</sup> The waitlist has grown even as the state made an additional 1,380 restoration beds available over

the last decade<sup>221</sup> and spent \$100 million to expand mental health diversion for people likely to become incompetent. The delays have resulted in a court order requiring the state to reduce the time it takes to begin competency restoration.

(*Id.* at 48-50.) The Committee made three recommendations:

- 1) Require judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense, including the likelihood and length of incarceration if convicted. A presumption against restoration would apply to: Penal Code section 1170(h) felonies, wobblers, and assault and robbery offenses. If a judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options.
- 2) Require court-appointed mental health experts to return competency evaluations within 30 days. The court may extend the time for good cause.
- 3) Require a judge to determine — and court-appointed mental health experts to opine — whether a person found incompetent to stand trial has a substantial probability of attaining competency within the required time frame. In addition, require the court-appointed mental health expert to evaluate their suitability for mental health diversion.

This bill implements most of these recommendations. Specifically, this bill requires judges to determine whether restoration to competency is in the interests of justice by considering all relevant circumstances of the offense. If the judge concludes that restoration is not in the interests of justice, the court can then consider diversion, a conservatorship, or other existing treatment options. This bill also requires the court-appointed mental health expert to complete competency reports within 30 days of the order, unless waived by the defendant or the court finds good cause for the extension. This bill also requires the mental health expert to evaluate the defendant's suitability for mental health diversion and for the expert and the court to determine whether a person found incompetent to stand trial has a substantial probability of attaining competency.

#### **4. Mental Health Diversion**

Diversion is the suspension of criminal proceedings for a prescribed time period with certain conditions. A defendant may not be required to admit guilt as a prerequisite for placement in a pretrial diversion program. If diversion is successfully completed, the criminal charges are dismissed and the defendant may, with certain exceptions, legally answer that he or she has never been arrested or charged for the diverted offense. If diversion is not successfully completed, the criminal proceedings resume, however, a hearing to terminate diversion is required.

In 2018, the Legislature enacted a law authorizing pretrial diversion of eligible defendants with mental disorders. Under the mental health diversion law, in order to be eligible for diversion, 1) the defendant must suffer from a mental disorder, except those specifically excluded, 2) that played a significant factor in the commission of the charged offense; 3) in the opinion of a qualified mental health expert, the defendant's symptoms of the mental disorder causing, contributing to, or motivating the criminal behavior would respond to mental health treatment;

4) the defendant must consent to diversion and waive the right to a speedy trial; 5) the defendant must agree to comply with treatment as a condition of diversion; and 6) the court is satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined, if treated in the community. (Pen. Code, § 1001.36, subs. (b)-(c).) The defendant is not eligible if they are charged with specified crimes. (Pen. Code, § 1001.36, subd. (d).)

In addition to the eligibility requirements of the defendant, mental health treatment program must meet the following requirements: 1) the court is satisfied that the recommended inpatient or outpatient program of mental health treatment will meet the specialized mental health treatment needs of the defendant; 2) the defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources; 3) and the program must submit regular reports to the court and counsel regarding the defendant's progress in treatment. (Pen. Code, § 1001.36, subd. (f).) The court has the discretion to select the specific program of diversion for the defendant. The county is not required to create a mental health program for the purposes of diversion, and even if a county has existing mental health programs suitable for diversion, the particular program selected by the court must agree to receive the defendant for treatment. (Pen. Code, § 1001.36, subd. (f)(1)(A).)

The diversion program cannot last more than two years for a felony and cannot last for more than a year on a misdemeanor. (Pen. Code, § 1001.36, subd. (f)(1)(C).) If there is a request for victim restitution, the court shall conduct a hearing to determine whether restitution is owed to any victim as a result of the diverted offense and, if owed, order its payment during the period of restitution. (Pen. Code, § 1001.36, subd. (f)(1)(D).)

The stated purpose of the diversion program is “to promote all of the following: . . . Allowing local discretion and flexibility for counties in the development and implementation of diversion for individuals with mental disorders across a continuum of care settings.” (Pen. Code, § 1001.35, subd. (b).)

As noted above, consistent with the recommendation of the Committee on the Revision of the Penal Code, this bill would require the mental health expert evaluating the defendant on the issue of competence to also provide an opinion on eligibility for mental health diversion, thereby saving potential resources in the form of a subsequent evaluation.

In addition, this bill would require the court to consider placing a defendant on mental health diversion in situations where the court determines that restoring the person to competency is not in the interests of justice.

## **5. Argument in Support**

According to ACLU California Action, a co-sponsor of this bill:

In 2018, the Council of State Governments Justice Center (CSG) convened an advisory group of experts to identify improvements to competency to stand trial procedures. In order to decrease the number of people jailed and wait-listed for state hospital, CSG recommendations included limiting the use of competency restoration to more serious cases.

In 2022, consistent with CSG's suggested recommendations, the Committee on the Revision of the Penal Code (CRPC) recommended that judges be allowed to

determine whether restoration to competency is in the interests of justice, applying a presumption against restoration for nonviolent offenses.

AB 1584 aligns with recommendations from CSG and CRPC by giving judges the discretion to determine the most appropriate response to a finding of incompetency, allowing for quicker determinations of eligibility for mental health diversion, and creating earlier off-ramps from state hospital waitlists to community-based care where safe and appropriate.

## 6. Argument in Opposition

According to California District Attorneys Association (CDAA):

(CDAA) opposes AB 1584, which would authorize the court to find that restoration of a defendant's mental competency not to be in the interests of justice for some severely mentally ill defendants. These individuals would not receive mental health services within the criminal justice system. Instead, their criminal case would be dismissed, and these severely mentally ill criminal offenders would be returned to the streets or their homes, where they would likely re-enter the criminal justice system. The Incompetent to Stand Trial Solutions Workgroup, Report of Recommended Solutions reported that 70% of people found to be incompetent are rearrested within three years.

AB 1584 would also eliminate the prosecutor's right to seek a jury trial on the issue of competency. According to the Department of State Hospitals, over 66% of defendants who were initially found to be incompetent were able to have their competency restored. (*Incompetent to Stand Trial Solutions Workgroup – Report of Recommended Solutions November 2021*. Pg. 11.) An individual's mental health status and one's incompetency can be fluid and can change over time. The 66% restoration rate bears this out. Oftentimes, the issue of competency is a factual issue that must be litigated. This factual determination should be a fair process dedicated to reaching the truth of the individual's mental competency. However, AB 1584 unfairly tips those scales of justice by eliminating the prosecutor's ability to demand a jury trial on the issue of competency, while allowing the defendant the ability to demand a jury trial.

-- END --